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Utah Supreme Court

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IN THE
SUPREME COURT

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OF THE
STATE OF UTAH
BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

MATTHEW PAGANO, CARMAN
PAGANO and MILLEO PAGANO,
Plaintiffs and Respondents,

vs.

MARY P. WALKER,
Defendant and Appellant.

Case No.
13864

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE 2nd
JUDICIAL DISTRICT COURT, IN AND FOR
WEBER COUNTY, STATE OF UTAH,
HONORABLE CALVIN GOULD, JUDGE PRESIDING

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FILED

APR 28 1975

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
STATEMENT OF KIND OF CASE	1
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	6
POINT I. THERE IS 'CLEAR AND CONVINCING EVIDENCE' TO SUPPORT THE FINDING OF FACT THAT APPELLANT MADE THE FOLLOWING STATEMENT TO HER BROTHERS: "MOTHER TOLD ME TO PAY HER BILLS, KEEP A LITTLE OUT FOR MY ARTHRITIS AND DIVIDE UP THE REST" ..	6
POINT II. APPELLANT'S DECLARATION OF THE INSTRUCTIONS SHE RECEIVED FROM HER MOTHER CONCERNING THE DIVISION OF THE FUNDS IN THE ACCOUNTS AND THEN HER SUBSEQUENT REPUDIATION OF HER TRUST JUSTIFY THE COURT IN IMPOSING A CONSTRUCTIVE TRUST UPON THESE FUNDS	13
POINT III. THE COURT ORDERED THE DISTRIBUTION OF THE FUNDS IN THE BANK ACCOUNTS IN QUESTION IN ACCORDANCE WITH LONG ESTABLISHED PRINCIPLES OF LAW	17
POINT IV. APPELLANT WAS GIVEN AMPLE OPPORTUNITY BY THE COURT TO HAVE LYNN WALKER'S TESTIMONY HEARD AND CONSIDERED BY THE COURT AND APPELLANT FAILED TO UTILIZE SUCH OPPORTUNITY	28

TABLE OF CONTENTS—Continued

	Page
CONCLUSION	32

AUTHORITIES CITED

Acott v. Tomlinson, 9 Utah 2d 71, 337 P. 2d 720	7
Capps v. Capps, 110 Utah 468, 175 P. 2d 470	10
Chadwick v. Arnold, 34 Utah 48, 95 P. 527	22, 27
Hawkins v. Perry, 123 Utah 16, 253 P. 2d 372	21
Haws v. Jensen, 116 Utah 212, 209 P. 2d 229	22, 23
In re Boyd's Estate, 37 So. 2d 902	20
In re Dewey's Estate, 45 Utah 89, 143 P. 124	17
In re Schulman, 72 N. Y. S. 2, 239	25
Jarkieh v. Badagliacco, 75 C. A. 2, 505, 170 P. 2d 994	23
Jewel v. Harmer, 12 Utah 2d 328, 366 P. 2d 594	12
Vaughan v. First Federal Savings and Loan Assn., 85 Idaho 266, 378 P. 2d 820	11, 26
Walker v. Walker, 17 Utah 2d 53, 404 P. 2d 253	11

TEXTS

3 Bogart on Trusts & Trustees, Part 1, 1946 Ed., Sec. 471	23
Restatement of Trusts, 2d, Sec. 17	13
Restatement of Trusts, 2d, Sec. 44	23
Restatement of Trusts, 2d, Sec. 99	14
Restatement of Trusts, 2d, Sec. 102	15
Scott on Trust, Vol. 1, Sec. 44.2	23

STATUTES

Utah Rules of Civil Procedure, Rule 43(c)	30
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

MATTHEW PAGANO, CARMAN
PAGANO and MILLEO PAGANO,
Plaintiffs and Respondents,

vs.

MARY P. WALKER,
Defendant and Appellant.

} Case No.
13864

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

This is an action in equity brought by respondents against appellant, their sister, to require appellant to divide funds, obtained through joint tenancy accounts with their mother, under circumstances where appellant has acknowledged that she was directed by her mother to divide this money with her brothers.

DISPOSITION IN THE LOWER COURT

The trial court, after trial with an advisory jury, impressed a constructive trust on the funds and rendered judgment requiring appellant to divide the funds with respondents.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmation on the judgment of the trial court.

STATEMENT OF FACTS

Appellant's statement of fact is correct as to the portions presented, but there are many important omissions regarding events both prior and subsequent to the death of Lucy Pagano, that form a basis for the court's equity decision.

Luke Pagano and Lucy Pagano had five children, the parties of this action, and a son Charles, who died in 1947. This couple, with the help of their two oldest sons, Matthew and Carman (TR 83, 129), operated small truck garden farms both within and outside the city limits of Ogden during their entire adult life (TR 24, 25, 82, 129). They were extremely frugal and invested their earnings in land, mortgages and escrows (TR 29, 231). Both Luke and Lucy Pagano were born in Italy, and although they were intelligent people, they had very little formal education (TR 27). Luke Pagano died in Ogden, January 5, 1965, and at the time of his death the joint tenancy

estate (TR 27, 28) with his wife, Lucy Pagano, was appraised at \$124,703.31.

After the death of her father, Luke Pagano, appellant's name was placed on all the accounts in issue, except one (TR 44, 45, 46). The accounts were established as joint accounts in the names of Lucy Pagano and Mary Walker (TR 44, 45, 46).

Appellant did not make any deposits of her own funds to said joint accounts, (TR 231) and she did not make any withdrawals for her own use from any of the joint accounts during her mother's lifetime. Appellant testified that she made withdrawals at the request of her mother, and that all funds so withdrawn were delivered to her mother (TR 41). The amount of money in dispute in this action is \$73,544.00 (TR 2, 26).

Lucy Pagano died at Ogden, Utah, on June 12, 1972, at the age of 81 years (TR 118). She left a last will and testament which was admitted to probate in Weber County, and said will provided in part as follows:

"THIRD: After payment of my debts, funeral expenses, expenses of last illness and expenses of administration, I GIVE, DEVISE AND BEQUEATH to my husband, LUKE PAGANO, all of the remainder of my estate, real, personal, PROVIDED, HOWEVER, that in the event of his prior death or in the event of his death prior to distribution of my estate, then I give, devise and bequeath all of my said estate to my four children, share and share alike, namely:

Matthew Pagano, my son

Carman Pagano, my son
Mary Pagano Adams, my daughter
Milleo Pagano, my son" (Pl Ex B).

During her lifetime Lucy Pagano made gifts of funds to her children. In April, 1967, she made the following gifts: \$5,000.00 to Matthew Pagano, \$5,000.00 to Carman Pagano, \$4,000.00 to Mary Walker and \$4,000.00 to Milleo Pagano (TR 85, 86). Thereafter Lucy Pagano made the following gifts: May 1969—\$3,000.00 to Matthew Pagano, \$3,000.00 to Carman Pagano, \$1,500.00 to Milleo Pagano and \$1,500.00 to Mary Walker (TR 26); on January 14, 1970, \$2,000.00 to Carman Pagano (TR 87, 93, 143) representing a portion of his investment in a farm; in January 1970, \$500.00 to Matthew Pagano, \$400.00 to Carman Pagano, \$300.00 to Milleo Pagano and \$300.00 to Mary Walker (TR 86). Lucy Pagano also made many small gifts to her children such as homemade bread, spaghetti, and other small items, and she was careful, in each case, to make such gifts very nearly equal (TR 57).

It was necessary, upon Lucy Pagano's death on June 12, 1972, to name an administrator with will annexed of her estate, since her husband, Luke Pagano, who was named executor of her will, had predeceased her. All four of her children, Matthew, Carman, Milleo and Mary, met at Millelo's home in Ogden to determine who the administrator should be. This meeting was held about two weeks after their mother's death. It was then determined that Carman Pagano and Mary Walker would

act as joint administrators (TR 75, 262). At this meeting there was conversation about the joint accounts, and Mary made the following statement: "Mother told me to keep a little out for my arthritis and divide the rest up" (TR 155, 121, 122, 123). A few days later Mary suggested that Lynn Walker, her husband, serve as a joint administrator in her place, and on June 30, 1972, all of the parties hereto signed a document nominating Carman Pagano and Lynn Walker as joint administrators of the Estate of Lucy Pagano with the will annexed (Pl Ex C).

Appellant had possession of an insurance policy on Carman Pagano's life, and her husband, Lynn Walker, delivered it to him near the end of September 1972 (TR 62). Appellant also had possession of an insurance policy on Milleo Pagano's life, and in September 1972, Milleo's wife, Margaret, telephoned Mary in regard to the possession of this policy (TR 15). At this request Mary replied, "Well, I'm the beneficiary on it, it belongs to me. Furthermore, I'm not going to divide the money" (TR 15). The following Sunday, Mary and Lynn Walker went to Milleo's home, delivered the insurance policy, and Mary told Milleo and Margaret that she was not going to divide the money (TR 22). She then added, "And don't you ever tell anyone I've got this money" (TR 15, 16, 17, 128).

During Lucy Pagano's lifetime there existed a relationship of trust and confidence between her and her daughter, Mary Walker (TR 28). Lucy Pagano, while

an intelligent person, had only a first grade education, and she relied on Mary to assist her in preparing papers and accounts (TR 27). Mary had a high school education, a year of business college training, and she had worked for six years as a secretary for a finance company (TR 26, 27).

On cross examination, Appellant testified that Lucy Pagano gave her the passbooks on the accounts involved in this case because she was afraid someone would break into her (Lucy's) house (TR 70, 230). During her lifetime, Lucy Pagano kept herself informed as to the balance in her accounts (TR 36).

While Lucy Pagano was hospitalized in March of 1972, Carman Pagano and appellant had a conversation at the hospital wherein Mary said, "There is not as much money in the bank as Milleo thinks there is." She further stated that her mother said to make sure that Carman paid off the mortgage on his home (TR 78, 79, 95, 96, 107).

ARGUMENT

POINT I.

THERE IS 'CLEAR AND CONVINCING EVIDENCE' TO SUPPORT THE FINDING OF FACT THAT APPELLANT MADE THE FOLOWING STATEMENT TO HER BROTHERS: "MOTHER TOLD ME TO PAY HER BILLS, KEEP A LITTLE OUT FOR MY ARTHRITIS AND DIVIDE UP THE REST."

Respondents have no dispute with the long standing rule that the evidence required to establish a constructive trust must be 'clear and convincing'. However, such rule does not go so far as to say that the evidence relied upon to establish the constructive trust must be uncontradicted. Appellant makes no claim of error on the part of the court in regard to the standard used by the court in weighing the evidence or in the court's instructions to the advisory jury. The court, after having heard the evidence, clearly stated to counsel that the matter was going to be decided by the court in accordance with the rules of equity. The statements made by the court at the conclusion of the trial, and the findings and judgment by the court were made in accordance with equitable rules. The Utah Supreme Court has established the standard for review of equitable decisions governing the determination of a trust as follows:

"The fundamental problem is whether the evidence will support the determination of trust. Or conversely, to apply the rule of review in equity cases: does the evidence 'clearly preponderate against the finding of the trial court' so that we would reverse such finding." *Acott v. Tomlinson*, 9 Utah 2d 71, 337 P. 2d 720, at Page 722.

The finder of the facts considered two separate occasions on which the appellant stated that she held the funds in issue in accordance with her mother's instructions to divide the money with her brothers. The first occasion was the meeting of all of the members of the

immediate family at Milleo's home for the purpose of naming an administrator with the will annexed. Present on this occasion were Matthew Pagano, Carman Pagano, Milleo and Margaret Pagano, appellant Mary Walker and her husband, Lynn Walker. Each of the respondents testified that on this particular occasion Milleo Pagano brought up the question of the money in their mother's savings accounts, and that Mary then made the statement, "Mother told me to pay her bills, keep a little out for my arthritis and divide up the rest." Respondents' evidence on what occurred on this occasion is clear and definite. Appellant's testimony in response was that she did not remember being at Milleo's home on such occasion (TR 51, 52, 53 & 189). However, appellant's husband, Lynn Walker, clearly recalled the meeting, and he testified on cross examination as follows:

"As near as I remember the instance, it was at Milleo's home where we did first get together and discuss the administrators.

Q. And that is consistent, of course, with the testimony of Carman and of Matthew and of Milleo, isn't it, and of Margaret?

A. I believe it is.

Q. And that is not consistent with Mary's testimony, is it?

A. That's correct.

Q. Mary said she had no recollection of such a meeting?

A. That's correct.

Q. But was Mary present with you at that meeting?

A. Well, I am sure she was" (TR 263).

Appellant's contention is that the only thing she said about the bank accounts was:

"That if they (her brothers) did not cause trouble for her she would consider setting aside some of the funds left to her in the joint tenancy account and divide them with her brothers as she saw fit." (Appellant's brief, pages 7-8.)

The second occasion on which appellant declared she had been instructed to divide the funds in the bank accounts occurred in July, 1972, when appellant and her husband, Carman Pagano and Milleo Pagano met at their mother's home. In regard to this occasion Milleo testified as follows:

"Q. And at that time did Mary make any statement concerning the money in the bank accounts?

A. Yes, sir.

Q. And what were they?

A. She said she would divide the money up if there wasn't any trouble.

Q. And what did you say about — what was your comment on that?

A. I told her I don't see how there could be any trouble.

Q. Was there any trouble at that time?

A. No, sir.

Q. Were you all getting along reasonably well?

A. Yes, sir" (TR 125).

Appellant's position regarding her statements to her brothers about dividing the money is contained in her testimony in response to questions from her own counsel:

"Q. Did you ever state that you would under any circumstances give part of the money to them, or did you state, as you have said, I will see about the money?

A. I will see about the money. I never said I would give them any amount or anything. I said I would see about the money" (TR 194).

Capps v. Capps, 110 Utah 468, 175 P. 2d 470, is similar to the case before the court in many respects. The *Capps* case was concerned with the claim of the three children of a deceased veteran that the mother of the veteran held the proceeds of his National Service Life Insurance Policy in trust for his children's benefit in accordance with the instructions he gave his mother before leaving for the combat zone where he was killed in action. The evidence in support of the creation and acknowledgement of the trust included statements made by the mother of the veteran, after his death, to the effect that she was collecting the insurance proceeds for the benefit of her deceased son's children. The Utah Supreme Court affirmed the judgment of the trial court which imposed a trust upon

the insurance proceeds and stated at page 475:

“It is true that in nearly all the cases decided by this court we have held that in order to establish a trust by parol, the proof must be clear and convincing; but some of the clear and convincing evidence may be furnished by the defendant, as in this case.”

The rule adopted by the Idaho Supreme Court in the case of *Vaughan v. First Federal Savings & Loan Association*, 85 Idaho 266, 378 P. 2d 820, is:

“Whether the evidence is clear and convincing as regards the establishment of the trust was a question for determination by the trial court in the first instance. In *re Alberts’ Estate*, 38 Cal. App. 42, 100 P. 2d 538, ‘Ordinarily, it is a question of fact for the trial court to determine’, *Fritz v. Thompson* (Cal. App.), 271 P. 2d 205, 210.”

In the case of *Walker v. Walker*, 17 Utah 2d 53, 404 P. 2d 253, the court was presented with a case wherein plaintiffs brought an action to impose a trust upon realty which was originally a part of their father’s estate. The trial court found in favor of the plaintiffs and imposed the trust. There was a dispute in the evidence, and preliminary to its review of the evidence the Utah Supreme Court stated at page 255 of the opinion:

“Where there is a dispute in the evidence we view it in a light most favorable to the trial court’s findings.”

Appellant relies heavily upon the case of *Jewel v. Harmer*, 12 Utah 2d 328, 366 P. 2d 594, for reversal of the findings and judgment of the trial court. There are many substantial differences between the facts in the *Jewel* case and the facts in the instant case. In the *Jewel* case the evidence in support of the Plaintiffs consisted of statements the deceased was alleged to have made to the plaintiffs concerning the establishment of the trust. On behalf of the defendant, Ethel Jewel Harmer, there was substantial evidence of statements by independent witnesses that her father intended to leave the property to Ethel, subject however to his life estate and a life estate in favor of his surviving widow, as provided in the deed. There was undisputed evidence that Ethel personally paid for the improvements to the property after the execution of the deed. In the *Jewel* case there was no evidence of the acknowledgement of the trust by the person holding title for the benefit of the beneficiaries, as there is in the case now before the court. The evidence in the *Jewel* case was in great dispute. The plaintiffs' principal independent witness, Fred Jensen, on cross examination, admitted that he had made a statement to Ethel Jewel and her attorney prior to trial, that was in direct conflict with his testimony on direct examination.

The rule in equity cases as adopted by the Court in the *Jewel* case at page 597 is:

“* * * this court, upon review, should not set aside the finding of the lower court unless it manifestly appears that the lower court has

misapplied proven facts or that the finding is clearly against the weight of the evidence."

POINT II.

APPELLANT'S DECLARATION OF THE INSTRUCTIONS SHE RECEIVED FROM HER MOTHER CONCERNING THE DIVISION OF THE FUNDS IN THE ACCOUNTS AND THEN HER SUBSEQUENT REPUDIATION OF HER TRUST JUSTIFY THE COURT IN IMPOSING A CONSTRUCTIVE TRUST.

Appellant claims that even if it is found that she made such a declaration, that the claim of constructive trust must fail as a matter of law. Appellant further claims that there is no evidence that Lucy Pagano attempted to set up a trust or that Appellant agreed to a trust relationship.

The evidence proving the creation of a trust is provided by appellant's own declaration, as found by the court and advisory jury, "Mother told me to take a little out for my arthritis and divide the rest" (TR 76, 122, 155). This type of declaration creates a trust in accordance with *Restatement of Trusts* 2d Sec. 17, which states:

"Section 17. METHODS OF CREATING A TRUST. A trust may be created by (a) a declaration by the owner of property that he holds it as trustee for another person; or . . ."

This section clearly recognizes the principle that an

owner of property, by a declaration, can create a trust in the property as trustee for another person. The legal effect of appellant's statement to her brothers that she was holding these accounts under her mother's instructions to divide these funds among her three brothers and herself is clearly a declaration of the nature referred to in Sec. 17 of the Restatement of Trusts. Appellant's declaration was made after her mother's death and at a time when she held legal title to the funds in the various bank accounts by virtue of her being the surviving joint tenant.

The fact that appellant is both trustee and a beneficiary does not in any way affect the validity of the trust or change her obligation as trustee. Section 99 of the Restatement of Trusts, provides as follows:

"Section 99. BENEFICIARY AS TRUSTEE.
... (2) One of several beneficiaries of a trust can be the sole trustee of the trust."

Appellant contends that there is no evidence that she agreed to the trust relationship. Her own statement as well as her conduct clearly establish her acceptance. The testimony of all of the witnesses is replete with examples of the relationship of trust and confidence that existed between appellant and her mother (TR 196). It has been conceded a relationship of trust and confidence existed between appellant and her mother. In addition to the declaration made by appellant, as found by the court and jury, there is also the evidence of appellant's

statement to her brother, Milleo, at her mother's home, "That she would divide the money if there was no trouble" (TR 124). Also in evidence is appellant's statement to her brother, Carman, while Lucy Pagano was in the hospital, to the effect that "Mother told me to make sure you paid off your mortgage" (TR 99). This statement was made at a time when Mary and Carman were discussing the bank accounts. All of these statements made by a person in a fiduciary relationship establish the fact that the trust was accepted by the appellant. The rule governing the acceptance of a trust is set forth in the Restatement of Trusts 2d Sec. 102:

"Section 102 . . . (2) If a trustee has accepted the trust, whether the acceptance is indicated by words or by conduct, he cannot thereafter disclaim . . ."

Each of the respondents testified that they relied on appellant's declaration to the effect that she intended to divide the accumulated savings accounts of her mother. Their conduct emphasizes their reliance upon her declaration. The good feeling that existed among the parties after appellant's statement at Milleo's home is apparent by the fact that respondents agreed that appellant's husband, Lynn Walker, be nominated to act as one of the administrators with the will annexed of Lucy Pagano's estate.

It was not until about three months after Lucy's death that any of the respondents learned that appellant had any intention of keeping all of these funds for herself

and making no division. The first indication to respondents that appellant did not intend to divide the funds came in a telephone conversation between appellant and Margaret Pagano, Milleo's wife, in September, 1972, when appellant said, "And furthermore I have decided not to divide the money, and I won't have a guilty conscience about it — it is mine" (TR 15). The preceding statement, made in September 1972, is a statement which is clearly indicative of a sudden change of mind when compared with appellant's statements made in June and July, 1972, to the effect that her mother told her to divide the money, (TR 194) and that she would divide the money if there was no trouble. Appellant's reversal of her previously stated position was further emphasized when she went to her brother Milleo's home and delivered his insurance policy to him. At that time she told Milleo and his wife, Margaret, that she wasn't going to divide the money (TR 124). Appellant further told Milleo, "Don't you ever tell anyone I have got this money" (TR 17, 128).

A constructive trust arises where a person holding legal title to property is subject to an equitable duty to convey it to another, and the holder of the legal title would be unjustly enriched if he were permitted to retain such title. Appellant's declaration concerning the funds accumulated by her parents clearly establishes that it was not Lucy Pagano's intention that appellant be the sole beneficiary of these funds. Under such circumstances appellant would surely be unjustly enriched if she were

not required to divide the funds with her brothers. Lucy Pagano's concern and pattern of conduct toward all of her children during her lifetime and the provision in her last will and testament for equal division among all her children show a clear intent to provide for all of her children. This intent is consistent with the statement appellant made to her brothers, and it is totally inconsistent with appellant's present position that she has "decided not to divide the money". The cases clearly support the view that a constructive trust will be imposed by the court to protect persons who have been wrongfully deprived of their rightful share of property. The case before the court contains a record of overwhelming evidence of a confidential relationship between appellant and her mother. This relationship of trust and confidence imposed a duty on appellant not to abuse such trust, nor to use it to obtain an unfair advantage over her brothers.

POINT III.

THE COURT ORDERED THE DISTRIBUTION OF THE FUNDS IN THE BANK ACCOUNTS IN QUESTION IN ACCORDANCE WITH LONG ESTABLISHED PRINCIPLES OF LAW.

The function of the trial court sitting in equity was to determine what distribution the court should make when a trustee has failed and refused to carry out the terms of the trust. This particular question is dealt with in detail in the case of *In Re Dewey's Estate*, 45 Utah

89, 143 P. 124. In this case the issue before the court was what distribution shall the equity court make when a trustee has refused to follow the directions provided in the Testator's will. The Testator's will provided as follows:

"All the rest, residue and remainder of my property of every kind and nature whatsoever, if any, which remain after paying discharging all the debts, bequests, legacies and obligations I bequeath to the said Hubbard Tuttle, Sr. It is my desire that he shall distribute the same, or the proceeds thereof among my nephews and nieces, and to such of them, and in such proportions, as he shall deem just and proper, and his decision upon such matters shall be final, conclusive and binding upon all parties."

In the above case the Trustee, instead of distributing the funds among the nieces and nephews as specified by the will, filed a document with the court whereby he appointed all of the funds to himself. The nieces and nephew filed objections to the proposed distribution by the Trustee, and they asked that certain portions of the estate be distributed to them.

On appeal, the Utah Supreme Court held that the bequest in which the testatrix expressed her wish or desire that the trustee distribute the residue or remainder among her nieces and nephews was not to be regarded as merely surplusage and without any force whatsoever, but it would be carried out and enforced by the court. The court at Page 128 of the Opinion, citing from 2 Beach

on Trusts, page 142, said:

“But, where for any reason, the discretionary power is not exercised, the entire class of the objects of the trust will be entitled to the property, and they will share and share alike.”

The court further considered the nature of the distribution that should be made at page 128 as follows:

“Where the testator has invested the trustee with discretion to select the beneficiary or beneficiaries from a certain class and to determine the amount that should go to each, and in case the trustee has honestly and in good faith exercised the discretion by making a selection and by fixing the amounts, the courts will not interfere with what the trustee has done in that regard; *but in case he has not complied with the terms of the trust in making a distribution, or has entirely failed to make any distribution, the courts, at the instance of an interested party in a proper proceeding, will make a distribution in such manner and upon such terms and conditions as may be equitable and as will best effectuate the purpose and intention of the testator.*” (Emphasis added.)

The court further quoted 1 Beach on Trusts, page 263, and stated:

“But if the donee for any reason fails to act and the property is not divided, equity will interpose in favor of the beneficiaries by treating it as a power in trust and enforcing its execution. *In such cases the distribution by the court will be to all the individuals of the class designated and*

in equal sums." (Emphasis added.)

The decision of the court was set forth as follows:

"In the case at bar the trustee, under the provisions of the will, could have executed the trust by making an equal division of the residue of the estate among all of the nephews and nieces, excluding himself, and therefore a court of equity may do so."

In the case of *In re Boyd's Estate*, 87 So. 2d 902, the Supreme Court of Mississippi was presented the question of interpretation of the word "divide" as used by a mother in a holographic will. The court, after considering the family background and the context in which the word "divide" was used, held:

"Circumstanced as she was, how did the testatrix intend Gladys divide with Richard? The dictionary gives this definition to the word 'divide': '1. To part asunder (a whole); to sever into two or more parts or pieces.' To the formal speaker of the language, 'divide' would no doubt mean to sever into two or more separate parts. But the language employed by the testator clearly indicated that she would use words in their colloquial meaning. The colloquial meaning of 'divide' is: 'To deal out something in portions or equal shares.' Webster's New International Dictionary, Second Edition, Unabridged. Here was a mother speaking to her children through her will. She was not speaking in the precise language of the lawyer or the formal speaker. It is our opinion that Mrs. Boyd intended that Gladys and Richard share equally in one-third of her estate.

Nor do we think that the fact that Mrs. Boyd provided for equal division of the estate into three parts for her three children indicated that she meant something other than equal division when she said that Gladys should divide with Richard. The provision for disposition of the insurance money if the property burned does not, in our opinion, evidence an intention that Richard should not get half of Gladys' one-third of her estate."

The Utah Supreme Court has long recognized the equity principle of constructive trusts.

In the case of *Hawkins v. Perry*, 123 Utah 16, 253 P. 2d 372, the fact situation was as follows: Hawkins, a boy of 16, saved \$300.00, and on the advice of Perry, his uncle, decided to invest his money in a house that could be rented instead of purchasing a car. Hawkins delivered his money to Perry on Perry's promise to buy the home in Perry's name and then convey it over to Hawkins when he became of age. Thereafter Perry made a contract to purchase the home. The project would have apparently worked as planned, except that Perry added his wife's name to the contract as a joint purchaser, and later Perry and his wife moved to Oregon, and were divorced. The Oregon divorce decree awarded Mrs. Perry all right, title and interest of Mr. Perry in the property.

Upon Hawkins' claim, the trial court held that there was a confidential relationship between Hawkins and Perry, and under the fact situation, it imposed a constructive trust upon the house held by Mrs. Perry for the

benefit of Hawkins. The trial court found Mrs. Perry paid no consideration for the property, was not a bonafide purchaser, and therefore she took the property subject to Hawkins' rights as a beneficiary.

In discussing the equity doctrine of a constructive trust the court said at Page 375:

"Equity imposes a constructive trust to prevent one from unjustly profiting through fraud or the violation of a duty imposed under a fiduciary or confidential relationship. The Utah decision of *Chadwick v. Arnold* declares '* * * that a trust *ex maleficio* (constructive trust) arises whenever a person acquires a legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and, having thus obtained the title, retains and claims the property as his own.' *It is now well recognized that actual fraud is not necessary, but may be presumed where there is a relationship of confidence between the parties to a transaction and there are other circumstances tending to show that some advantage had been taken by the dominant party with a consequent abuse of confidence.* (Emphasis added.)

In *Haws v. Jensen*, we wrote:

'A constructive trust will be imposed even though at the time of the transfer the transferee intended to perform the agreement, and even though he was not guilty of undue influence in procuring the conveyance. *The abuse of the confidential relation consists merely in the failure*

of the transferee to perform his promise.” (Emphasis added.)

In the Utah case of *Haws v. Jensen*, 110 Utah 212, 209 P. 2d 229, at Page 232, the Utah Supreme Court held that the mother-daughter relationship was evidence of the confidential relationship of the parties, citing *Scott on Trust*, Vol. 1, Sec. 44.2, and stating:

“Constructive trust is imposed even if there is no fiduciary relationship, such as that between attorney and client, principal and agent, trustee and beneficiary, it is sufficient that there is a family relationship or other personal relationship of such a character that the transferor is justified in believing that the transferee will act in his own interest.”

Restatement of the Law of Trusts, Sec. 44 comment (c) accord.

“A court of equity in decreeing a constructive trust, is bound by no unyielding formula but is free to effect justice according to the equities peculiar to each transaction wherever a failure to perform a duty to convey property would result in unjust enrichment. 3 *Bogart on Trusts and Trustees*, Part 1, 1946, Ed., Sec. 471.”

A case that is remarkably similar to the case now before the court is *Jarkieh v. Badagliacco*, 75 C. A. 2, 505, 170 P. 2d 994, California 1946. In this case plaintiff and defendant were brother and sister. Anna Jarkieh, mother of the parties, was an uneducated person unable

to read and write. During her lifetime the mother was in a close relationship with her daughter, and the mother trusted the daughter. The evidence was conflicting, but the evidence most favorable to plaintiff supports the implied finding by the jury that at the time the trustee and two joint tenancy accounts were opened the defendant orally promised her mother that upon her mother's death she would divide the money equally with her brother. The evidence showed that all accounts had their origin in accounts formerly in the name of Anna Jarkieh. The money represented a lifetime of saving and scrimping by the mother.

Defendant attacked the judgment, principally in regard to the joint accounts, and relied on Section 15a of the California Bank Act which provided in pertinent part:

"The making of the deposit in such form (joint tenancy) shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the addition thereto in such survivor or survivors."

In holding that a trust may be created in joint bank deposits the court stated at page 99:

"It might also be pointed out that under Sec. 15a, in the case of joint deposits, in the absence of fraud or undue influence, *the surviving joint tenant only takes title to the account.* There

is nothing in the wording of that section that precludes a holding that in a proper case, regardless of fraud or undue influence, the surviving joint tenant holds that legal title in trust for another. In such a case the conclusive presumption contained in the section is not being disturbed. *Title goes to the survivor but evidence is admissible to show that the survivor holds such title subject to the terms of a trust.*" (Emphasis added.)

In the case of *In re Schulman*, 77 N. Y. S. 2, 239 (1947), the court held:

"The testimony adduced on the hearing convincingly establishes that respondent's mother, Ida Schulman, was solicitous of the well-being of the respondent and intended to provide for him by the moneys in the account represented by the savings bank book herein involved. The account had been opened in her name. In 1939 she caused it to be changed by adding the name of her son, Joseph, decedent herein, as a true joint account, on his promise that the funds therein would be used for the benefit of respondent if anything should happen to her and decedent herein should survive. The provisions of Section 239, Banking Law, apply and on Ida Schulman's death, the account, by reason of the provisions of that section, passed to the joint tenant, decedent herein. However, the record contains uncontradicted, clear and convincing testimony of admissions by decedent, after his mother's death, that he was holding the account for respondent's benefit pursuant to his mother's direction. A constructive trust for the benefit of respondent resulted.

The Court finds on all evidence that the moneys in the account were held by Joseph Schulman, decedent herein, after his mother's death for the benefit of respondent and that such moneys are the property of respondent. The administratrix will, therefore, be directed to assign to respondent the money represented by the account in question and execute and deliver to him whatever papers or documents may be necessary to perfect his title thereto. Proceed accordingly."

The Idaho case of *Vaughan v. First Federal Savings and Loan Association*, 85 Idaho 266, 378 P. 2d 820 (1963), dealt with a question similar to that now before the court. In this case Lucy Vaughan and John Vaughan divided their common or community funds on April 22, 1960 and on May 13, 1960, Lucy commenced an action for divorce from John. On May 31, 1960, John Vaughan and his brother Ted executed a joint savings account agreement on an account that represented John's share of the funds remaining from the division with his wife. On June 8, 1960, John Vaughan died, and Lucy Vaughan was appointed Administratrix of his estate. Shortly after his brother's death, Ted Vaughan caused the savings account to be transferred into his own name. Ted Vaughan is also guardian of the person and estate of John's minor daughter, Mischael Diane Vaughan. Lucy Vaughan, as Administratrix, of John Vaughan's Estate, brought an action against Ted Vaughan alleging the money in the savings account was an asset of decedent's estate. By his answer

Ted Vaughan alleged that John Vaughan had added Ted's name to the savings account

"for the purpose of transferring all right, title and interest in the same to defendant (Ted) for the use and benefit, and in trust, for John Theodore Vaughan (Decedent's son) and Mischael Dianne Vaughan, the son and daughter of the decedent."

At the trial John Theodore Vaughan, decedent's son, testified that Lucy Vaughan informed him by letter that the savings account

"was placed in the joint name of your father and Ted R. Vaughan for the purpose of creating a trust."

The trial court held that a trust had been created under the circumstances and the Idaho Supreme Court affirmed the decision. The court at page 823 stated:

"In determining the effect of a joint bank account agreement, the determinative consideration is the intent of the depositor, and this is a question for the trier of the facts."

In the case of *Chadwick v. Arnold*, 95 P. 527, 34 Utah 48, the court recognized the power of the equity court to declare and administer a constructive trust. The court at page 532 said:

"Courts of equity in order to administer complete justice between the parties, will raise a trust by

construction out of the circumstances, and this trust they will fasten on the conscience of the offending party and will convert him into a trustee of the legal title and order him to hold it for the benefit of the owner."

POINT IV.

APPELLANT WAS GIVEN AMPLE OPPORTUNITY BY THE COURT TO HAVE LYNN WALKER'S TESTIMONY HEARD AND CONSIDERED BY THE COURT, AND APPELLANT REFUSED TO UTILIZE SUCH OPPORTUNITY.

Appellant made an offer of proof regarding Lynn Walker's testimony in chambers upon the record. At that time the court stated:

"THE COURT: Well, without question, counsel, the theory that's now presented by the plaintiffs in this case makes it an equity case. I have the jury here as an advisory jury, and my handling of the case at this point is to put to them the single question of whether or not following her mother's death Mary Walker made the statement: 'Mother told me to keep a little out for my arthritis and to divide the rest up.' I am going to have the benefit of the jury's advice on that question, remembering that the ultimate decision in the case is for the judge to make. *After the jury has deliberated, Mr. Huggins, I am going to allow you to put that evidence before me. If I determine later that the objection, on the basis of the deadman statute, is valid, I can order*

it stricken and not let it be part of my determination" (TR 269).

The evidence referred to above by the Court is the evidence in question in Appellant's Point IV.

After the above remarks by the court, the jury was instructed, counsel made their arguments, and the jury retired. Immediately after the jury retired, the following statement was made in open Court:

MR. KUNZ: "Your honor, it was my understanding at this time that Mr. Huggins was going to make an offer of proof."

COURT: "He did so in chambers on the record. Well, I will take any further offers after a brief recess" (TR 272).

Counsel for appellant made no further offer of proof subsequent to the offer made in chambers on the date of trial despite the above suggestion made by counsel for respondents.

After the finding by the jury on May 9, 1974, the court set the case for further hearing on May 14, 1974, and on this date the following inquiry was made by the court to counsel for appellant:

COURT: "My first inquiry was going to be, counsel, whether or not anyone is offering further evidence?"

MR. IRA HUGGINS: "No, we have no further evidence in view of the court's ruling in the past" (TR 273).

At this same hearing the court in addressing itself to counsel for appellant stated as follows:

THE COURT: “* * * The first thing I want to know is whether or not your side has any further evidence to offer.”

MR. IRA HUGGINS: “If the court follows the decision of the jury, yes, we will have to offer some evidence” (TR 274).

The court then made the following inquiry to counsel for respondent:

THE COURT: “Will you be offering further evidence, Mr. Kunz?”

MR. KUNZ: “I have nothing further to offer at this time, your Honor. Of course, if counsel offers evidence, I would certainly like the right to cross-examine. And depending on that evidence, I may have to offer some. But at this time I offer nothing further” (TR 275).

The court's repeated offers to appellant to hear Lynn Walker's testimony were not accepted, and it is only fair to conclude that appellant did not wish to avail herself of the opportunity to have the testimony of this witness reported in full.

Rule 43 (c) U. R. C. P. provides as follows in respect to excluded evidence:

“(c) RECORD OF EXCLUDED EVIDENCE.
In an action by a jury, if an objection to a question propounded to a witness is sustained by the

court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. *In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."*

It is clear from the record that the court definitely advised appellant that the ultimate decision in this case would be made by the court and not the jury (TR 269). The record demonstrates the court gave appellant an opportunity to have the testimony of Lynn Walker taken in full and on the record for the consideration of the court (TR 272, 273, 274). Counsel for respondents made it clear that he expected such testimony would be offered to the court and on the record, and that he was prepared to cross examine this witness (TR 272). Appellant did not choose to put such testimony on and submit this witness to cross examination on the evidence as set forth in the offer of proof made in chambers (TR 268, 273, 274). It is submitted that by the failure to place such testimony in the record and to subject the witness to cross examination, that appellant has waived any claim that the court erred in not considering the testimony of Lynn Walker. The failure of appellant to present such testimony in the

record before the court was not due to the ruling of the court, but it was a conscious choice made by appellant. Therefore, appellant cannot be said to have suffered any prejudice as a result of any ruling by the court.

CONCLUSION

The judgment of the court imposing a constructive trust upon the funds in issue and dividing these funds equally among the four children of Lucy Pagano is supported by 'clear and convincing evidence' and is a proper application of recognized principles of law. It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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